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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BEVERLY SHERRILL GOBEN, individually,

Plaintiff,

v.

WAL-MART STORES, INC., a Delaware Corporation, NORTH AMERICAN ROOFING, SERVICES, INC., a foreign corporation, DOES I–V; and ROE CORPORATIONS I -V, inclusive,

Defendants.

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WAL-MART STORES, INC., a Delaware corporation,

Cross-claimant,

v.

NORTH AMERICAN ROOFING SERVICES, INC., a foreign corporation, DOES I–V; and ROE CORPORATIONS I -V, inclusive,

Cross-defendants.

Case No.: 2:12-cv-00086-JCM-NJK

**WAL-MART STORES, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

COMES NOW WAL-MART STORES, INC. ("Walmart"), by and through its attorneys of record of the firm PHILLIPS, SPALLAS & ANGSTADT, LLC, and hereby submits its Reply in Support of its Motion for Summary Judgment.

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## I. INTRODUCTION

North American Roofing Services, Inc.'s ("NAR") entire Response relies on the false premise that a showing of negligence is required before NAR's duty to indemnify is triggered. To support this false premise, NAR relies on a Nevada case that has no bearing on the Master Service Agreement ("Contract") between Walmart and NAR. The Contract at issue contains a choice of law provision, which explicitly states that Arkansas law will govern any disputes relating to their Contract. Thereby, NAR's citation to Nevada case law is irrelevant and is meant to confuse the issues. Pursuant to Arkansas law, the undisputed facts affirmatively establish that NAR is in breach of contract given its refusal to indemnify Walmart. The indemnification clause of the Contract states that NAR must indemnify Walmart for any lawsuits or claims arising out of or related to NAR's 1) acts, omissions or negligence or 2) breach of the Contract or any Scope of Work agreement.

The undisputed facts in this matter demonstrate that the indemnification clause has been triggered for multiple reasons: 1) Plaintiff's lawsuit is related to NAR's acts, omissions or negligence; 2) Plaintiff's liability expert Charles Haines has determined that NAR's work was deficient; 3) NAR breached the Scope of Work agreement when it failed to work on the expansion joint in 2009; 4) NAR breached the Contract when it failed to name Walmart as an additional insured on its insurance policy; and 5) NAR breached the Contract when it failed to accept Walmart's request for indemnification. NAR has done nothing to rebut these undisputed material facts. The only way that summary judgment may be denied is to disregard the choice of law provision in the parties' Contract. As such, Walmart is entitled to summary judgment on its Third-Party Complaint against NAR.

## II. LEGAL ARGUMENT

### A. The Choice Of Law Provision In The Contract Is Enforceable.

NAR incorrectly argues that substantive Nevada law governs the analysis of the Contract between Walmart and NAR. A federal court sitting in diversity applies the forum state's choice of law rules. *See Abogados v. AT & T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000) (citing *Klaxon Co. v.. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). However, Nevada's choice of law principles permit broad limits to parties to choose the law that determines the validity and effect of their contract. *See Sievers v. Diversified Mortgage Investors*, 603 P.2d 270, 273 (Nev. 1979). The Nevada Supreme Court has stated that "[i]t is well settled that the expressed intention of the parties as to the applicable law in the construction of a contract is controlling if the parties acted in good faith and not to evade the law of the real situs of the contract." *Id.*

The Ninth Circuit has also held that where the parties have entered into a contract that specifies that another jurisdiction's law will govern their disputes, the foreign states choice of law should be applied. *See Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) (finding that when a tort claim involves interpretation of a contract between the parties, the choice-of-law provision in the contract applies) (citing *Visicorp v. Software Arts, Inc.*, 575 F.Supp. 1528 (N.D. Cal. 1983) (holding that federal law applies to interpret a forum selection clause, because forum selection is primarily a venue matter)).

Additionally, Section 188 of the *Restatement (Second) of Conflict of Laws* § 187(2)(b) (1971) provides that contracts are governed by the law of the state that has the most significant relationship to the transaction. In this case, Arkansas has the most significant relationship to the transaction because Walmart is an Arkansas company that performed its obligations under the contract in Arkansas and suffers damages in Arkansas. Thereby, NAR's citation to a Nevada Supreme Court holding in *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Development Company, Inc.*, 255 P.3d 268, 275 (Nev. 2011) is irrelevant as it is not binding authority in this matter.

Even if Nevada law were to apply to this matter, the *Reyburn* case is not applicable. In *Reyburn*, the Supreme Court held that the indemnification clause did not obligate the subcontractor to indemnify the contractor for the contractor's contributory negligence and that the contractor was required to make a showing of negligence on the subcontractor's part in order to trigger the subcontractor's indemnification obligations because the contract explicitly stated that the subcontractor would indemnify the contractor against "any and all liability…*save and except claims or litigation arising through the sole negligence or sole willful misconduct of [c]ontractor[.]" Id.* (emphasis added). In the present matter, no such language was contained in Walmart and NAR's Contract.

The Contract language provides in pertinent part:

> 10. Indemnification
>
> (a) "Contractor ***shall at all times indemnify, defend and hold harmless Wal-Mart*** [ ] against and from ***any and all lawsuits, claims***, *actions, expenses (including reasonable attorney's fees and costs,), damages (including punitive, consequential and exemplary damages), obligations, fines, penalties, correction action costs, liabilities, and liens (including, without limitation, claims for personal injury (even if solely emotional in nature)*, death and damage to property) ("Claims") arising out of or ***related to (1) the acts, omissions,*** negligence or willful misconduct ***of Contractors*** [ ] in connection with the provisions of the Services, (2) **any breach, violation or default by Contractor of this Agreement or any Scope of Work**, (3) any lien, security interest, claim or encumbrance in favor of any person or entity by reason of having provided labor, materials or equipment relating to the Services…"

*See* Docket Filing #92, Exhibit C thereto.

The Contract does not state that NAR shall indemnify Walmart *save and except claims or litigation arising through the sole negligence of Walmart*. Rather, the Contract explicitly states that NAR shall indemnify Walmart against any and all claims related to the acts, omissions, *or* negligence of NAR. The four-corners of the Contract do not require a showing that NAR was negligent before the indemnification clause is triggered. Plaintiff's allegations against NAR undisputedly trigger NAR's contractual obligation to defend and indemnify Walmart. Plaintiff inserted factual allegations in her Complaint which stated that her damages were in part due to NAR's negligence in constructing the roof, thereby NAR's contractual obligations to defend and indemnify Walmart were triggered. *See* Docket Filing No. 55. Moreover, Plaintiff's liability expert, Charles Haines, opined that NAR had failed to adequately repair the roof to prevent leaks, this statement likewise triggered the indemnification clause. *See* Docket Filing #92, Exhibit L thereto. NAR has done nothing to rebut these undisputed facts that trigger indemnification.

Additionally, it would be nonsensical to require a showing of negligence prior to NAR being obligated to indemnify Walmart, as the indemnification clause of the Contract is not only triggered by claims of negligence. Rather, the indemnification clause is triggered when there is a claim that is related to NAR's **acts or omissions**, whether or not the act or omission constitutes negligence. Moreover, the indemnification clause is triggered when there is a breach of any Scope of Work agreement or the Contract itself. As discussed below, summary judgment is appropriate because the indemnification provision of the Contract has been triggered for multiple reasons.

**B. NAR Itself Admitted That It Breached 2009 Scope Of Work Agreement.**

No one could have been clearer regarding whether NAR breached the Scope of Work Agreement regarding the 2009 roofing project than NAR itself. NAR's FRCP 30(b)(6) deponent testified that NAR never even installed the new metal caps on the expansion joint as required by the Scope of Work Agreement:

> Q: So when it says new coping and then there's a circle around the N, that means no new metal caps?
>
> A: On the expansion joint.
>
> Q: Okay. So does that mean that no new metal caps were installed on the expansion joint?
>
> A: Correct.

*See* Docket Filing #92, Exhibit J thereto at 58: 16-21.

> Q: So you tie it in through the flashings that you explained going up and over the expansion joint?
>
> A: Well, now, reviewing this, we really wouldn't have had to do that at all. We just did a tie-in. That's more than likely why there's no photos of the expansion joint itself. We didn't even touch it.

*Id.* at 71:12-18.

Q: Okay. So as you sit here today, do you know whether or not North American Roofing did any other work on the expansion joint other than just tying it in?

A: Tying it in, yes.

Q: That's all they did.

A: Yes.

Q: Okay. So they didn't touch the expansion joint.

A: No. Did not have to.

*Id.* at 72: 7-15.

In fact, when NAR's FRCP 30(b)(6) witness was shown the Scope of Work Agreement which specifically required NAR to replace and re-install new metal caps on the expansion joint, he testified that it was impossible for NAR to have conducted that work because NAR stopped its work before it even got to the expansion joint:

Q: Okay. I want you to look on NAR 59, specifically, the paragraph that's marked D.

A: Yes.

Q: Do you see it says roof/building expansion joints, and then it says at curb to curb expansion joints, remove existing expansion joint cover. Provide new base flashings as specified. Reinstall existing cover. Seal joints as specified.

A: Uh-huh.

Q: Is that right?

A: Yes.

Q: Did North American Roofing do this as part of their project in 2009?

A: According to this drawing here, it stopped before you got to the expansion joint, so it was impossible to do.

….

A: As listed here, no, this was not performed.

*Id.* at 81:20-82:22; *see also* Docket Filing #92, Exhibit P thereto.

Thereby, NAR's own testimony affirmatively establishes that not only did NAR 1) omit the work on the expansion joint, but 2) NAR breached the Scope of Work agreement by failing to replace and re-install the metal caps on the expansion joint. Thereby, the indemnification clause of the Contract has been triggered for three different reasons:

1) There is a claim and the claim is related to NAR's acts or omissions;
2) There is a claim and the claim is related to NAR's breach of the Scope of Work agreement; and
3) NAR breached the Contract by failing to accept Walmart's tender.

Therefore, summary judgment in favor of Walmart is proper as the undisputed material facts establish that NAR must indemnify Walmart pursuant to the Contract because NAR breached the Scope of Work Agreement and the Contract.

### C. **NAR Breached The Contract When It Failed To Name Walmart As An Additional Insured On Its Liability Insurance.**

NAR's Response ignores the fact that the Contract contains an insurance clause that specifically mandates that NAR shall "name Wal-Mart Stores, Inc. its subsidiaries and its affiliates as additional insureds[.]" The insurance clause says in pertinent part:

11. Insurance

> At all times during the term of this Agreement, and whether or not any Scopes of Work are then outstanding, Contractor shall keep in full force and effect certain minimum insurance coverage as follows:
>
> (a) Commercial General Liability insurance including Contractual Liability, Personal and Advertising Injury Liability, Products-Completed Operations Liability, Medical Payments, Bodily Injury and Property Damage Liability with minimum limits of $1,000,000 per occurrence and $2,000,000 aggregate.
>
> …Each Commercial General Liability shall: (i) **name Wal-Mart Stores, Inc. its subsidiaries and its affiliates as additional insureds**; (ii) provide defense coverage an additional benefit and not within the limits of liability; (iii) contain a waiver of subrogation in favor of Wal-Mart, and (iv) be issued on an occurrence basis.

*See* Docket Filing #92, Exhibit C thereto at ¶11.

NAR points to the "Blank Additional Insured" provision of its liability insurance and claims that this meets the Contract's requirement. However, it is undisputed that NAR did not actually name Walmart or its subsidiaries in its liability insurance as required by the Contract. Therefore, the indemnification clause of the Contract is once again triggered because NAR breached the terms of the Contract by not specifically naming Walmart as an insured. If NAR had actually named Walmart as an additional insured on its liability insurance, Walmart could have already resolved the underlying claims with Plaintiff using its insurance. However, by having failing to comply with its obligations to name Walmart as an additional insured under its policy NAR has once again breached the Contract thereby triggering the indemnification clause once again. Therefore, Walmart is entitled to judgment as a matter of law.

**D. Any Possible Independent Negligence of Walmart Does Not Relieve NAR of its Contractual Obligation to Indemnify Walmart in This Lawsuit**

NAR's attempt to distinguish the Eight Circuit Court of Appeals case in *Wal-Mart Stores, Inc. v. RLI Insurance Company*, 292 F.3d 583, 587-588 (8th Cir. 2002), is unpersuasive when the language of both indemnification contracts are viewed together. In *RLI*, the contract contained two indemnity clauses:

> [Cheyenne] shall protect, defend, hold harmless and indemnify [Wal–Mart] from and against any and all claims [and] actions ... or arising out of any actual or alleged death or of injury to any person ... or other damage or loss, by whomsoever suffered, resulting or claimed to result in whole or in part from any actual or alleged defect in such merchandise ....
>
> Indemnification; [Cheyenne] agrees to save [Wal–Mart] ... harmless and indemnified from all claims, liability, loss, damage and expense, including reasonable attorneys' fees, sustained from the purchase, use o[r] sale of any goods or from the breach of any of the guaranties or warranties hereunder ... and such obligations shall survive acceptance of the goods and payments therefor by [Wal–Mart].

*Id.* at 587-88.

Similar to NAR, RLI argued that the indemnity clause was ineffective to cover Walmart's own negligence because it was not clearly expressed in the contract. *Id.* at 588. The Court rejected the argument because the indemnity provision stated that "Cheyenne will indemnify Wal-Mart for claims resulting '*in whole or in part*' from any actual or alleged defect in the lamps." *Id.* The Court ruled that "any possible negligence by Wal–Mart does not protect Cheyenne from its contractual promise to indemnify Wal–Mart." *Id.*

Similarly, here the Contract states that NAR will indemnify Walmart from any and all lawsuits and claims "arising out of or related to the acts, omissions, negligence or willful misconduct of [NAR.]" Plaintiff's lawsuit fulfills the first requirement that there be a lawsuit or claim, and Plaintiff's allegation against NAR fulfills the second requirement that it be related to the acts of NAR.

The plain language of the Contract states that NAR is required to indemnify Walmart when there is a claim related to NAR's acts. NAR attempts to distinguish *RLI* because it involved a different factual scenario, yet the factual scenario has no relevance to the interpretation of an indemnification clause. Under Arkansas law, the court ascertains the plain and ordinary meaning of a contract. *Moore v. Columbia Mut. Cas. Ins. Co.*, 36 Ark.App. 226, 821 S.W.2d 59, 60 (1991). When a contract is unambiguous, the court determines its construction as a matter of law. *Cate v. Irvin*, 44 Ark.App. 39, 866 S.W.2d 423, 426 (1993).

Therefore, NAR's argument that Walmart was negligent has no bearing on NAR's duty to defend and indemnify Walmart. NAR's refusal to accept tender constitutes breach by the plain language of the Contract. The Nevada case law cited by NAR has not, and cannot, proffer any evidence which refutes or voids NAR's express obligations under the Contract. Thus, Walmart is entitled to judgment as a matter of law.

**E. Reeves' Inspection Did Not Guarantee That NAR's Work Was Not Deficient**

NAR's response contains several factual misrepresentations. Pursuant to the express language of the Contract, there is no requirement that there be showing of negligence on the part of NAR before indemnification is triggered. NAR attempts to confuse the issue of indemnification by focusing on whether or not it was negligent and attempting to create an issue of fact for the jury. Again, the issue for summary judgment is not whether or not NAR was negligent, rather it is whether the indemnification clause of the Contract was triggered. The undisputed material facts in this matter establish that the indemnification clause was triggered as discussed above. However, even if a showing of negligence was required, the deposition testimony of all the witnesses, including NAR's witnesses, confirms NAR's negligence because NAR never removed and re-installed the metal caps on the expansion joint.

Additionally, NAR relies on the final inspection report of Reeves Consulting which stated that "[i]in general, the roof appears to have been installed in compliance with the project" that NAR's work was not deficient. *See* Docket Filing #92, Exhibit E. However, NAR fails to inform the Court that Reeves Consulting in no way guaranteed that the roof was watertight. In fact, the Principal of Reeves Consulting, Jerry Reeves, testified that during the final inspection his company checked only up to ten percent of the thousand square feet of seams that were installed by NAR. *See* Docket Filing #92, Exhibit Q thereto at 51:3-25. Nobody physically checked 90% of the seams to ensure that the seals were tight. *Id.* Additionally, nothing was done to check whether the metal caps on the expansion joint were sealed properly. *Id.* at 52:20-:53:8. In fact, Mr. Reeves agreed that the way to determine whether the roof is watertight is to wait for the first rain:

> Q: Okay. So basically what you do is you wait for the first rain after the roof is installed, and that's the gold standard. That's the test to determine if the roof is watertight.
>
> …
>
> A: Correct.

*Id.* at 54:14-19.

Mr. Reeves also confirmed that the final inspection in no way guaranteed that the roof is watertight:

Q: Okay. And so whether it's you or your son or anybody who's a capable, experienced inspector, such as yourself, the fact that you get up on the roof and you look at it for a few hours and probe about ten percent of the seams, and then reach an opinion, well it looks like generally it appears to have been installed properly, you are absolutely in no way warranting or guaranteeing that the roof is watertight?

A: No.

Q: And your son was not in any way opining that the roof was watertight?

A: No.

*Id.* at 54:24-55:11.

Thereby, NAR's reliance on the final inspection report has no relevance to this motion for summary judgment. Rather, NAR muddies the waters by attempting to create an issue of fact that has no relevance to this motion. The undisputed material facts in this matter show that the indemnification clause was triggered multiple times when 1) Plaintiff filed her lawsuit; 2) Charles Haines opined that NAR's work was deficient; 3) NAR failed to remove and re-install the metal caps on the expansion join; 4) NAR breached the Contract because it failed to name Walmart on its liability insurance; 4) NAR breached the Scope of Work Agreement when it failed to work on the expansion joint; and 5) NAR breached the Contract because it failed to accept Walmart's request for indemnification. NAR has presented no facts in its Response to refute any of the five undisputed facts above, which each individually triggered indemnification in this case. To that end, Walmart is entitled to summary judgment.

**F. NAR Has Presented No Evidence That The February 24, 2010 Repair Work Was Not Warrantied.**

Throughout discovery, NAR has denied that its post-incident repair work was warrantied. In response to Walmart's Interrogatory to identify each person with information supporting NAR's contention that the roof repairs performed on February 24, 2010 at Walmart Store #2592 were not warrantied, NAR disclosed Carl Cortright and Kenny Tolle. *See* Exhibit A, attached hereto. Yet neither of NAR's witnesses were able to confirm that NAR's work on February 24, 2010 was not warrantied. NAR's service technician Mr. Tolle testified he had no knowledge regarding whether NAR's post-incident repair work was warrantied:

Q: You don't know whether the repair that was made on February 24th, 2010, was warrantied or not?
A: No, I do not.
Q: You don't know whether the repair the repair that was made on February 24th, 2010 was ever billed to Walmart?
A: I have no knowledge.
Q: You don't know whether Walmart ever paid North American Roofing for the work that was done on February 24th, 2010?
A: I do not.

*See* Exhibit B attached hereto, 102:24-104:7.

Likewise, Carl Cortright had no information regarding whether or not NAR's post-incident work on February 24, 2010 was warrantied:

Q: So as you sit here today, do you know whether or not Wal-Mart was billed for the work that was done on the expansion joint on February 24, 2010?
A: I don't know that from sitting here, no.
Q: And you don't know whether the work done on the expansion joint on February 24, 2010, was warrantied or not; correct?
…..
A: No, I don't.

*See* Exhibit C at 64: 4-20.

Despite NAR's admission that it completely failed to work on the expansion joint in 2009 and NAR's inability to produce a single witness who can testify that the repair work conducted on the same roof on February 24, 2010 was warrantied, NAR continues to deny Walmart's tender. As explained above, not only was the indemnification provision of the Contract triggered for five different reasons, but even if NAR's argument were to be believed that a showing of negligence is required prior to the triggering of the indemnification clause, which it does not, NAR's own witnesses have affirmatively established NAR's negligence. As such, summary judgment is warranted.

### G. NAR's Argument That It Should Have Been Provided Notice Of Its Deficient Work Is Illogical.

In a futile attempt to overcome summary judgment, NAR argues that it cannot be held liable because it did not have actual or constructive notice of its own deficiencies. NAR cites to *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247 (1993), for this proposition. In *Sprague* the plaintiff claimed to have slipped and fallen on a grape and the Court found that "[w]here a foreign substance on the floor causes a patron to slip and fall, and the business owner or one of its agents caused the substance to be on the floor, liability will lie, as a foreign substance on the floor is usually not consistent with the standard of ordinary care. Where the foreign substance is the result of the actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it." *Id.* at p. 250-251.

NAR argues pursuant to *Sprague* that it "had no prior notice whatsoever of any alleged deficiencies in its work" and "[a]bsent prior notice, North American Roofing cannot be held liable." *See* Docket Filing No. 96, 14:20-15:2. To be clear, deficient work is not a foreign substance and this is not a notice type case. It is illogical for NAR to contend that it must be provided notice of its own deficient roofing work before it could be held liable. In fact, NAR's Response is rampant with irrelevant case law that has no applicability to this case. The simple issue to be determined with respect to Walmart's summary judgment motion is whether or not the indemnification clause of the Contract was triggered. The undisputed facts in this case demonstrate that NAR should have indemnified Walmart for several different reasons and thereby summary judgment should be granted in Walmart's favor.

## III. CONCLUSION

Walmart respectfully requests that this Court grant its Motion For Summary Judgment as NAR has failed to rebut any of the undisputed facts that triggered its duty to indemnify Walmart:

1) Plaintiff's lawsuit;
2) Charles Haines' expert report;
3) NAR's breach of the Scope of Work Agreement;
4) NAR's breach of the Contract because it failed to name Walmart as an additional insured on its liability insurance; and
5) NAR's breach of the Contract due to is failure to indemnify Walmart.

Walmart has five separate and distinct reasons as to why summary judgment should be granted in its favor, and NAR's Response fails to rebut any of the five undisputed facts above. Rather, NAR's Response focuses on irrelevant case law and theories that have no applicability to this Motion. No genuine issues of material fact remain as to the allegations set forth in Walmart's Third-Party Complaint against NAR, and as such, Walmart is entitled to judgment as a matter of law.

DATED this 31st day of March, 2014.

**PHILLIPS, SPALLAS & ANGSTADT LLC**

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 31st day of March, 2014, I served a true and correct copy of the foregoing, **WAL-MART STORES, INC.'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**, via the Court's CM/ECF system, to the following counsel of record, at the address listed below:

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/s/ Billi Montijo

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